



**Global Privacy
Enforcement Network**

GPEN Report

‘Resetting privacy’

July 2021

UK Information Commissioner’s Office

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Summary

‘Resetting privacy’ is a Global Privacy Enforcement Network (GPEN) initiative, led by the UK Information Commissioner’s Office (UK ICO) to review if and how privacy enforcement and consumer protection authorities have changed their approach to regulation and enforcement during the COVID-19 pandemic, and whether they plan to ‘reset’ their approach as it subsides.

This complements GPEN’s 2021 Sweep activity on whether COVID-19 solutions and initiatives implemented around the world have taken into account privacy considerations.

Relevant data was gathered by conducting a survey of privacy enforcement and consumer protection authorities, and holding a virtual roundtable. 27 authorities from around the world responded to the survey and 17 took part in the roundtable. This report sets out and analyses the findings from this activity. Some of the key points are:

- Almost half of participants reported that they made a change to their regulatory approach during the pandemic.
- The most common change was an extension to time limits for responding to regulatory enquiries for organisations facing difficulties as a result of the pandemic, or providing front-line response to it.
- The majority of authorities that made changes are undecided about if and how to revert to their pre-pandemic approach to regulation and enforcement. But some already have, or plan to do so dependent on infection rates, relaxation of restrictions and signs of economic recovery.
- Although changes in approach were mostly modest, it is possible that diverging approaches to regulation and enforcement during the pandemic could lead to a lack of clarity amongst organisations around the expectations of the regulatory community.
- At the same time, a combination of a perceived relaxation of regulatory rules and the increasing collection and use of data throughout the pandemic may be contributing towards a ‘new normal’ among organisations of less privacy-friendly use of data compared to pre-pandemic norms.
- Some authorities raised the question of whether an adapted or enhanced approach to regulation would be necessary as the pandemic subsides in order to reaffirm privacy and data protection rights.

To help address issues such as these and further support authorities in their considerations around approaches to regulation and enforcement as the pandemic subsides, this report recommends ongoing collaboration on this topic: within GPEN; between GPEN and the Global Privacy Assembly, and with consumer protection authorities via GPEN’s Network of Networks initiative.

Introduction

Background

The Global Privacy Enforcement Network (GPEN) connects privacy enforcement authorities (PEAs) from around the world. Each year it undertakes several activities to promote and support cooperation in cross-border enforcement of privacy laws.

One of the annual activities is the GPEN Sweep. This is a coordinated action to assess global privacy practices on a specific topic. In 2020-21, the global pandemic led the GPEN Committee to focus the Sweep on the extent to which COVID-19 solutions and initiatives implemented around the world had taken into account privacy considerations.

‘Resetting privacy’

In parallel with looking outward at the practices of other organisations, the GPEN committee was keen to look inward at the effect of the pandemic on PEAs and others in the regulatory community.

In addition to the Sweep, the UK ICO (a GPEN Committee member) therefore led on a separate but complementary COVID-19 activity to review how PEAs and consumer protection authorities have adapted their approach to regulation and enforcement during the pandemic, and whether they plan to ‘reset’ their approach as it subsides. We refer to this activity as ‘resetting privacy’.

Aims

Three key aims motivated the ‘resetting privacy’ activity; they were to:

- assess if, how, and why PEAs and other regulators have adapted their approach to regulation and enforcement during the pandemic;
- gauge if, how, and why PEAs and other regulators plan to ‘reset’ their approach to regulation and enforcement as the pandemic subsides; and
- develop a shared understanding of this amongst PEAs and other regulators, to better inform individual and collective decision-making and messaging around regulation and enforcement during the pandemic.

Approach

Two methods were used to collect data for the ‘resetting privacy’ activity.

Survey

First, a survey was circulated to all members of the following networks of data protection and privacy authorities:

- GPEN
- Global Privacy Assembly (GPA)
- Common Thread Network (CTN)
- Asia Pacific Privacy Authorities Forum (APPA)
- Association Francophone des Autorités de Protection des Données Personnelles (AFAPDP)
- Red Iberoamericana de Protección de Datos (REDIPD)

To solicit responses from other relevant regulators in addition to PEAs, the survey was also circulated to consumer protection authorities via the International Consumer Protection Enforcement Network (ICPEN).

The survey asked authorities to answer questions about three aspects of their regulatory approach and activity during the pandemic:

- changes made to their approach to regulation and enforcement;
- plans to maintain or ‘reset’ changes to their approach to regulation and enforcement as the pandemic subsides; and
- trends in volumes and types of complaints and breach notifications.

The survey was open for response between October 2020 and January 2021.

Roundtable

Second, to complement the survey, a virtual ‘resetting privacy’ roundtable was held in the margins of the 2020 GPA, attended by PEAs and consumer protection authorities.

The format and focus of the roundtable mirrored the content of the survey:

- the first half of the session provided a forum for participants to update on how they had adapted their approach to regulation during the pandemic; and
- the second half of the session prompted participants to reflect on and discuss how they envisaged maintaining or 'resetting' their regulatory approach in a post-COVID-19 context.

The roundtable took place on 27 October 2020.



Findings

Survey

A total of 27 authorities from Africa, Asia Pacific, Europe, and North America responded to the survey. Responses for each section of the survey are summarised below.

Regulatory approach

Just under half of respondents advised that their authority had made changes to its approach to regulation and enforcement as a result of the COVID-19 pandemic (see Fig. 1). For the authorities that did not make any changes, 40% discussed this, but decided against doing so.

Where authorities did make changes to their approach, almost all indicated that for their internal processes, they were increasingly relying on digital technologies to perform some of their functions, and around a third explained that they switched to video teleconferencing to perform audits and inspections.

In relation to their external posture, half of respondents that made changes to their approach indicated that they had extended the time limits for responses from organisations in relation to investigations, information requests or compliance orders. But only 15% of those authorities indicated that they had reprioritised or paused ongoing regulatory activity.

Just 15% of authorities advised that the changes they had made had a 'sunset clause' or specific end date. The other 85% of authorities stated that the changes were either open ended or discretionary and would be applied on a case-by-case basis.

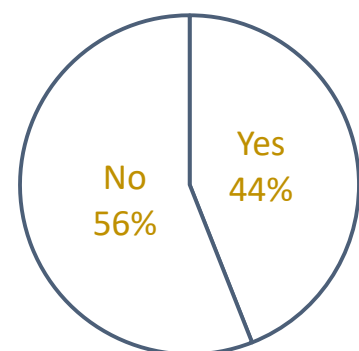
The most common factors that influenced changes made by authorities were the publication of non-binding guidance by government, and a recognition of the operational and practical difficulties facing organisations during the pandemic. In addition, a quarter of authorities reported that changes made were influenced by observed shifts in public perceptions of privacy, and the temporary enactment of new laws in their jurisdiction.

The majority of authorities that made changes to their regulatory approach communicated this to businesses and the public via their website, while a third of authorities advised that they had directly communicated with stakeholders via methods such as email and online consultation.

Resetting regulatory approach

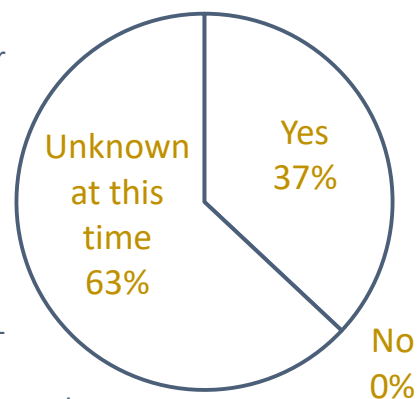
The majority of respondents indicated that they did not yet know whether their authorities would revert to a pre-pandemic 'business as usual' approach to regulation and enforcement

FIG. 1 - HAS YOUR AUTHORITY'S APPROACH TO REGULATING AND ENFORCING DATA PROTECTION AND PRIVACY LAW (OR CONSUMER PROTECTION) CHANGED AS A RESULT OF THE COVID-19 PANDEMIC?



once the pandemic subsides, although just over a third of authorities reported that they either had already done so, or planned to. None of the authorities that responded to the survey indicated that they had already decided not to revert or reset their approach (see Fig. 2).

FIG. 2 - DOES YOUR AUTHORITY PLAN TO REVERT TO SOME OR ALL OF ITS 'BUSINESS AS USUAL' APPROACH TO REGULATING AND ENFORCING DATA PROTECTION LAW ONCE THE PANDEMIC HAS SUBSIDED?



Of the authorities that reported they did intend to revert their regulatory approach, half indicated that this was because they either did not make any changes, or the changes were relatively modest and they had already reset to business as usual. The most common aspects of their regulatory approach that authorities indicated they either already had, or planned to reset, were time limits for responses from organisations to formal enquiries and the reintroduction of in-person regulatory activity (such as on-site monitoring and inspection of data processing activity). Nevertheless, some respondents also noted that they would likely maintain some digital aspects of the approach adopted during the pandemic in order to continue to benefit from the ability to conduct certain activity remotely, such as video interviews in investigations.

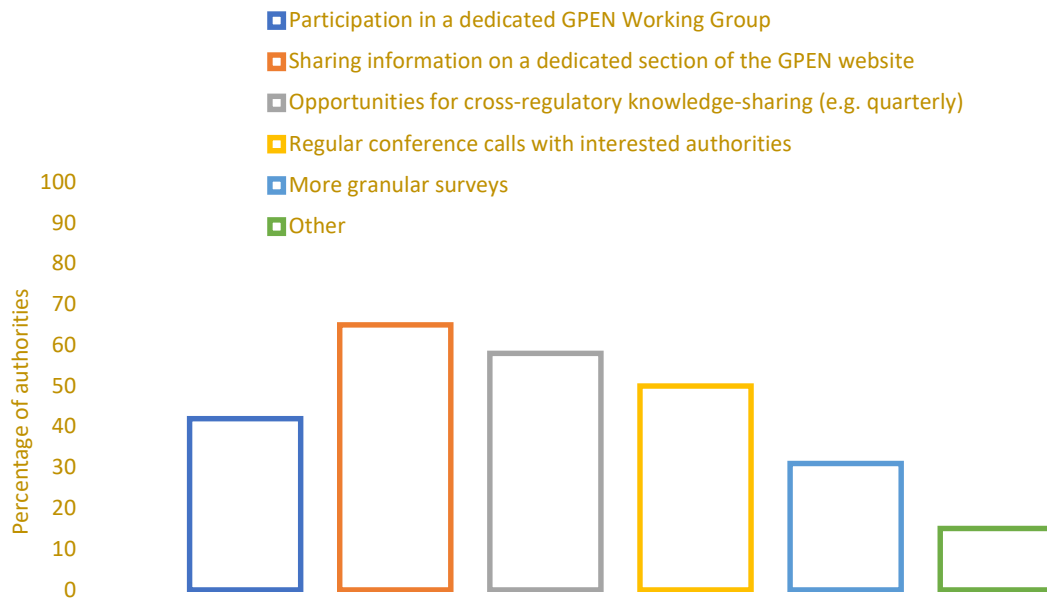
Most authorities that had reverted, or planned to revert, their regulatory approach, reported relatively simple reasoning for doing so: a normalised landscape / society should be reflected in a return to normalised regulation. Some authorities also highlighted a need to adhere to their core regulatory purpose or statutory function as an influencing factor, namely upholding information rights and reducing privacy risks for individuals.

The most common factor cited by authorities as an indicator for when it would be appropriate to begin the process of reverting regulatory approach was falling infection rates, followed by: relaxation of restrictions; signs of economic recovery; and government or public health guidance. One authority reported that they may revert their approach on a case-by-case basis to take into account an organisation's unique situation and capacity to engage with them.

In terms of communicating a return to business as usual approach to organisations and the public, most authorities reported that they would use their websites and social media accounts. Some reported that they would also engage directly with certain organisations or industry bodies on a targeted basis.

When asked whether cooperation with other authorities would be beneficial in informing their own planning for regulation and enforcement as the pandemic subsides, over 95% of respondents indicated that they thought it would be. The three types of cooperation to facilitate this most commonly selected by authorities were: information sharing via the GPEN website; opportunities for knowledge sharing across regulatory regimes; and conference calls (see Fig. 3).

Fig. 3 - Would your authority find cooperation with other authorities beneficial in helping to evaluate and plan its approach to regulating and enforcing data protection law as the pandemic subsides? If so, how?



Complaints and breaches

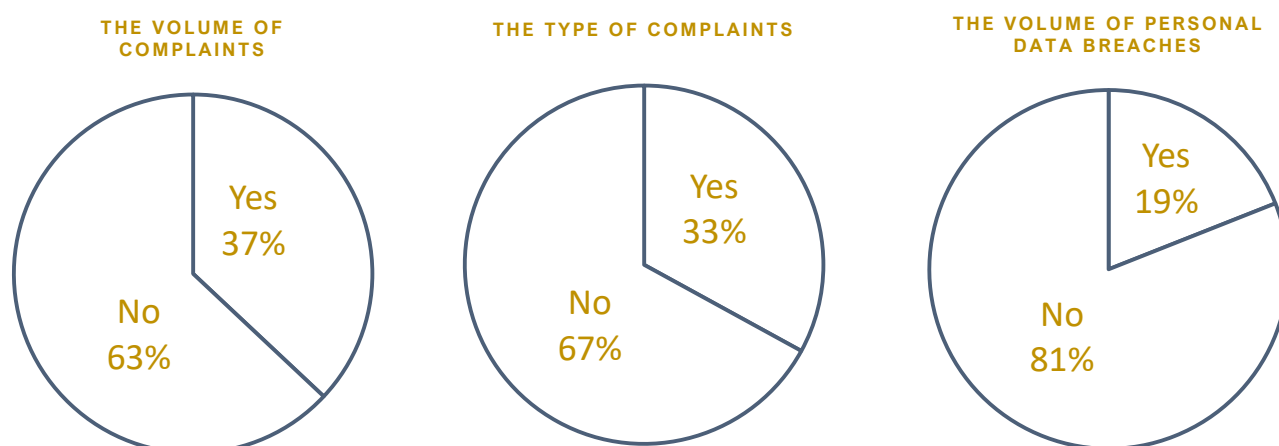
Around two thirds of authorities indicated that they had not noticed any new or emerging trends in the volume or type of complaints received during the pandemic, and the majority of respondents stated that they had not seen any changes in the volumes of personal data breaches reported to them (see Fig. 4).

Of those that indicated there had been a change in the volume of complaints received, while most reported an increase, just under half noted that they had actually seen a decrease, either initially, or throughout the pandemic.

Where changes to the type of complaint received were reported, almost all authorities advised that these related to the pandemic, such as complaints about: contact tracing (including processing of children's data); inappropriate disclosure of test results; and, in a consumer protection context, cancellation of flight, venue and accommodation bookings.

Of the small proportion of authorities that saw an increase in the volume of personal data breaches reported to them, over half indicated that these related to cyber-attacks or phishing-attacks.

FIG 4 – HAS YOUR AUTHORITY NOTICED ANY NEW OR EMERGING TRENDS IN THE FOLLOWING AREAS SINCE THE PANDEMIC BEGAN?



Roundtable

17 authorities from Asia Pacific, Europe, North America and South America attended the roundtable. Discussions from the session are summarised below.

Regulatory approach

Some authorities reported changes they had made to their regulatory approach as a result of the pandemic, including: extending time limits for organisations to respond to enquiries or report breaches; allowing organisations to conduct expedited privacy impact assessments; and adopting a less prescriptive, more principles-based, interpretation and application of data protection law. One authority noted however that they also had to work with organisations, in particular public health authorities, to clarify that measures adopted in response to the pandemic could not simply supersede data protection and privacy obligations.

However, fewer than half of participants reported making changes to their regulatory approach. Rather, participants explained that they had been supportive and had taken an enabling approach to organisations facing difficulties during the pandemic, but had stopped short of making tangible and externally visible changes to their regulation and enforcement.

More common amongst the participants were reported changes to internal ways of working within authorities in order to adapt to the novel circumstances of the pandemic. Changes included reprioritisation of work to free up resource to focus on issues raised by the pandemic, and increased use of digital technologies to support day-to-day remote working and for use in fulfilling regulatory duties.

Resetting regulatory approach

Where participants reported that they had made changes to their approach to regulation and enforcement, they generally indicated that as the pandemic subsides, they also planned

to revert to their pre-pandemic approach, for instance by reaffirming to organisations the need to adhere to privacy-by-design and carry out comprehensive privacy impact assessments.

When considering post-pandemic approaches to regulation, several authorities noted a greater prominence given to data protection and privacy during the pandemic, and an increased awareness amongst the public of data use and rights.

It was recognised by some participants, however, that despite this increased awareness, the pandemic has accelerated digitalisation trends and thus increased privacy risks to individuals. As a result, legislative and regulatory approaches may need to be enhanced or augmented by guidance in order to return privacy as a human right to its pre-pandemic status and support responsible innovation and data use by organisations.

As regards internal ways of working, many authorities reported that they were likely to retain some practices they had adopted during the pandemic due to their positive impact. This included increased engagement and collaboration with the public sector and use of digital technologies to support remote working.

Complaints and breaches

Several authorities noted seeing an increase in complaints received, especially at the outset of the pandemic, and one reported that complaints had doubled compared to the same period the previous year. Where complaints increased, almost all authorities advised these related to the pandemic, including: data sharing in educational settings; contact-tracing; and, in a consumer protection context: scams, cancellations, and price gouging.

The findings raise some interesting questions about the differing regulatory approaches adopted by authorities during the pandemic, and the impact of those changes – and the pandemic itself – on the privacy and data protection landscape as the pandemic subsides. Some of the key themes and questions raised are summarised below.

A lack of clarity?

Most authorities that took part in the survey and roundtable reported that they did not make changes to their approach to regulation and enforcement during the pandemic, but this was only a slim margin: there was a relatively even split between those that did and did not make changes. There are several possible reasons for this divergence including the differing spread of the pandemic across jurisdictions; the severity of the restrictions imposed and resulting impact on organisations; the historic regulatory approach adopted by authorities; and potential variance in the cultural and legal significance of data protection, privacy and broader consumer rights.

But regardless of the reasons, the fact that authorities have taken and communicated differing approaches to regulation and enforcement during the pandemic, even if the changes made were relatively modest in practice (e.g. extending time limits, pausing regulatory activity) , could create confusion or a lack of clarity around the ongoing expectations the regulatory community has for organisations' handling of personal data. Moving forward, it may help for authorities to consider this as they engage with organisations, especially those operating across several jurisdictions. There is potential scope for GPEN members, and others, to work together on myth-busting and reaffirming organisations' data protection and privacy obligations as the pandemic subsides. Looking beyond the pandemic, there may also be opportunity to reflect and consider possible coordinated or common approaches to regulation and enforcement in the event or similarly exceptional global situations that may arise in the future.

A new normal?

Where authorities made externally-facing changes to their regulatory approach, these tended to focus on an extension of time limits or minor adjustments to rules, in order to support organisations facing difficulties as a result of the pandemic, and those providing front-line services in response to it. These changes were predominantly around easing administrative burdens to take account of the extraordinary circumstances, without undermining the core principles of data protection and privacy which still applied in full. While this is the case, there is a potential risk that this change in approach could have been interpreted more broadly by organisations outside that specific context as a relaxation of the rules and an implicit acceptance of a more flexible and selective approach to compliance with data protection, privacy and consumer protection obligations.

At a time when digital services are necessarily being used more than ever before (including by regulators), and more data is being observed, collected and shared, there is the possibility that the perception of a lighter-touch regulatory regime may lead to a 'new

normal' of data use that is more privacy intrusive than pre-pandemic norms. Indeed, one authority reported the need to correct an assumption in the public sector that measures to deal with the pandemic could supersede data protection obligations.

Of course, there are limitations to the methodologies used for this activity, including the questions that were and were not posed to respondents. As such, it is possible that authorities are individually or collectively alive to this issue and may have mitigated or dismissed it as low risk. But if not, authorities may wish to consider the extent to which the post-pandemic privacy and consumer protection landscape will actually mirror the pre-pandemic 'normalised' status quo (as some authorities indicated they expected it would), and if not, what the implications could be for regulatory approach.

Changing attitudes?

Authorities that participated in the roundtable session noted an increase in awareness of privacy and data protection rights amongst the public during the pandemic. But in parallel some authorities also acknowledged that perceptions of privacy may have shifted, with some people more permissive about the use of personal data and the perceived necessary trade-off between privacy and data sharing, especially for public health purposes. The differing reports from authorities in this initiative mean that the extent to which public attitudes on data protection and privacy may have changed as a result of the pandemic, and the direction of any change, is unclear.

It may therefore be beneficial for authorities to consider how they might engage with the public (both at a national and global level) to gauge their opinion on data protection, privacy and acceptable use of data as the pandemic subsides. This could help better inform decisions on post-pandemic regulatory approaches including whether a straight-forward reaffirmation of privacy and data protection rights and obligations is appropriate, or if public attitudes might indicate a need for a degree of reinterpretation those rights and obligations as well.

Resetting or adapting?

Most authorities that responded to the survey indicated that they had not yet made a decision on whether to reset their approach to regulation and enforcement as the pandemic subsides, but for those that had, there was a general consensus of resetting the approach to that of a 'normal' pre-pandemic status. However, this contrasts with discussion among some roundtable participants who took the view that regulatory approaches may need to be adapted to reaffirm or refresh privacy rights and awareness post-pandemic, and to more proactively monitor the ongoing effectiveness of data intensive COVID-19 measures, the necessity and proportionality of continued use of data, and adherence to data retention and sunset clauses.

These differing findings may be the result of the research methods used, with the roundtable potentially providing space for the emergence of more nuanced views than the written responses to the standardised questions in the survey. Nonetheless, some authorities remain uncertain on their post-pandemic approach to regulation and

enforcement, and are at varying stages of a challenging decision-making process, with multiple factors to take into account and several possible options with which to move forward.

Additionally, since carrying out the 'resetting privacy' activity, the fluid and fast-moving context of the pandemic has resulted in: new and more contagious variants of COVID-19; vaccine roll outs and associated use of data such as 'vaccine passports'; and further waves of infections resulting in differing stages and levels of restrictions around the world. What one might consider as the 'end' of the pandemic is perhaps even less clear and more difficult to determine than it was before the 'resetting privacy' activity took place. It would appear therefore that further collaboration and coordination would be beneficial for authorities to help support each other as they consider their regulatory approach and navigate out of the pandemic. This is reflected in the survey respondents' near unanimous support for continued cooperation on these issues.

Recommendations

As identified in the findings and analysis sections of this report, there appears to be clear appetite for, and benefits to, ongoing cooperation in the privacy, data protection and consumer protection regulatory communities in order to surface and collectively address issues, and identify reasoned and appropriate approaches to regulation and enforcement in a post-pandemic world.

In order to facilitate further cooperation, this report makes the following three recommendations:

1. **Collaboration within GPEN** – Recommendation for the GPEN Committee and members to establish, promote and actively use a dedicated thread in its online discussion forum to share documents or opportunities relevant to post-pandemic regulation and enforcement, including:
 - Internal enforcement-related policy development and decisions;
 - relevant information from external sources, including reports, articles and surveys; and
 - potential coordinated activity, such as public / industry engagement or joint statements.
2. **Collaboration with the GPA** – Recommendation for the GPEN Committee to reach out to any relevant Working Group at the GPA to explore how the networks may be able to collaborate on the topic of post-pandemic regulation and enforcement, including consideration of a joint roundtable or event.
3. **Collaboration across regimes** – Recommendation for the GPEN Committee to reach out to ICPEN through the Network of Networks to share learnings from recommendations 1 and 2, and invite respective updates from the consumer protection regulatory community.